Supreme Court, U.S.
FILED
06-296 AUG 29 2006
OFFICE OF THE CLERK

(1)

No. 06-

IN THE

Supreme Court of the United States

ARTICLE II GUN SHOP, INC.,
d/b/a GUN WORLD

Petitioner

v.

ALBERTO GONZALES,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD E. GARDINER*
Suite 404
10560 Main Street
Fairfax, Virginia 22030
(703) 352-7276

Counsel for Petitioner
**Counsel of Record*

QUESTION PRESENTED

Whether the term "willfully" as used in 18 U.S.C. § 923(e) (authorizing revocation of a firearm dealer's license for willful violations) has the same meaning as the term "willfully" as used in 18 U.S.C. § 924(a)(1), which this Court interpreted in *Bryan* v. *United States*, 524 U.S. 184 (1998) to mean that person must act intentionally and purposely and with the intent to do something the law forbids, where both terms were enacted by the Firearms Owners Protection Act of 1986?

PARTIES TO THE PROCEEDING

The parties are Article II Gun Shop, Inc., d/b/a Gun World, an Illinois corporation with its principal place of business in the State of Illinois. Article II Gun Shop, Inc. has no parent corporation and no publicly held company owns any of the corporation's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

STATUTES 1

STATEMENT OF THE CASE 2

Proceedings in the Courts Below 2

Statement of Facts 4

ARGUMENT 10

I. THE MEANING OF THE TERM "WILLFULLY" IN 18 U.S.C. § 924(a)(1), AS DETERMINED BY THIS COURT IN *BRYAN v. UNITED STATES*, 524 U.S. 184 (1998), APPLIES TO § 923(e) .. 10

II. GUN WORLD DID NOT "WILLFULLY" VIOLATE THE REGULATION 21

CONCLUSION 23

APPENDIX

Opinion of the United States Court
of Appeals for the Seventh Circuit 1a

Order of the United States Court
of Appeals for the Seventh Circuit
Denying Petition for Rehearing En Banc 16a

TABLE OF AUTHORITIES

CASES **Page**

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 21

Appalachian Resources Development Corp. v.
McCabe, 387 F.3d 461 (6th Cir. 2004) 20

Brown v. Gardner, 513 U.S. 115 (1994) 13

Bryan v. United States, 524 U.S. 184 (1998) ..... *passim*

Commissioner v. *Keystone Consol. Industries, Inc.*,
508 U.S. 152 (1993) 13

Groh v. Ramirez, 540 U.S. 551 (2004) 23

J. W. Bateson Co. v. Board of Trustees,
434 U.S. 586 (1978) 16

K Mart Corp. v. Cartier, Inc.,
486 U.S. 281 (1988) 17

Lewin v. *Blumenthal*,
590 F.2d 268 (8th Cir. 1979) 11

NLRB v. Amax Coal Co.,
453 U.S. 322 (1981) 20

National Rifle Ass'n v. Brady,
914 F.2d 475 (4th Cir. 1990) 17

Perri v. *Department of Treasury; Bureau of Alcohol, Tobacco and Firearms*,
637 F.2d 1332 (9th Cir. 1981) 11

Philbrook v. Glodgett,
421 U.S. 707 (1975) 19

Prino v. *Simon*,
606 F.2d 449 (4th Cir. 1979) 11

Rich v. United States,
383 F.Supp 797 (1974) 18, 19

Stein's, Inc. v. Blumenthal,
649 F.2d 463 (7th Cir.1980) ..... *passim*

Tysinger Motor Co. v. United States,
--- F.Supp.2d ----,
2006 WL 940320 (E.D.Va. 2006) 20

Willingham Sports, Inc. v. *Bureau of Alcohol, Tobacco, Firearms and Exposives*,
415 F.3d 1274 (11th Cir. 2005) 20

Zuber v. Allen,
396 U.S. 168 (1969) 17

STATUTES

Firearms Owners Protection Act of 1986,
Pub.L. 99-308, 100 Stat. 449 (1986) 11, 12, 13, 16, 17

Gun Control Act of 1968
(Chapter 44 of Title 18, § 921 *et seq.*) 13, 16, 17

18 U.S.C. § 923(e) 1, 10, 18, 20, 23

18 U.S.C. § 923(f)(3) 2, 3

18 U.S.C. § 923(f)(4) 16

18 U.S.C. § 924(a)(1) 1, 10, 12, 18, 20

LEGISLATIVE MATERIALS

Senate Report 98-583,
98th Cong., 2d Sess. (1984) 17, 18, 19

OTHER AUTHORITIES

27 C.F.R. § 478.124(c) 4

27 C.F.R. § 478.124(c)(3)(i) 6, 7, 8

27 C.F.R. § 478.124(c)(5) 6, 7

OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment revoking Petitioner's firearms dealer license was published at 441 F.3d 492 (7th Cir. 2006) and is printed in the Appendix ("App.") at App. 1a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit affirmed the judgment revoking Petitioner's firearms dealer license on March 20, 2006. App. 1a. A timely filed Petition for Rehearing En Banc was denied on May 16, 2006. App. 16a. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTES

18 U.S.C. § 923(e) provides in pertinent part:

> The Attorney General may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has **willfully** violated any provision of this chapter or any rule or regulation prescribed by the Attorney General under this chapter. (emphasis added).

18 U.S.C. § 924(a)(1) provides in pertinent part:

> (1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever -
>
> (A) knowingly makes any false statement or

representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) **willfully** violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both. (emphasis added).

STATEMENT OF THE CASE

Proceedings in the Courts Below

Following receipt of a Final Notice of Denial of Application or Revocation of Firearms License (hereinafter "Final Notice") from the Director of Industry Operations ("DIO") for the Chicago Field Division of the Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF") notifying Gun World that its federal license as a dealer in firearms, other than destructive devices, was revoked, Gun World timely filed a Petition For Judicial Review, pursuant to 18 U.S.C. §

923(f)(3),[1] seeking *de novo* judicial review of the five (5) counts which were the basis of the revocation.[2]

Following discovery, the Government filed a motion for summary judgment only with respect to Counts 2 and 3 of the Petition For Judicial Review. Count 2 alleged that Gun World had not engaged in an unlawful "strawman" sale as found by the DIO; Count 3 alleged that Gun World had not "willfully" violated record-keeping requirements with respect to fifteen (15) Forms 4473 as found by the DIO. Gun World filed an opposition to the Government's summary judgment motion, asserting, *inter alia*, that, with respect to Count 2, there were genuine issues of material facts, precluding summary judgment. Gun World also asserted, with respect to Count 3, that the Government's motion referred only to twelve (12) of the fifteen (15) Forms 4473. To support its opposition, Gun World filed affidavits of Barry Soskin and Elizabeth Rodgers. In its reply,

---

[1] After receiving notice of a final revocation, a licensee:

> may at any time within sixty days after the date notice was given under this paragraph file a petition with the United States district court for the district in which he resides or has his principal place of business for a de novo judicial review of such denial or revocation.

18 U.S.C. § 923(f)(3).

[2] Each count alleged a "willful" violation of a provision of the applicable regulations. Counts 1 and 2 each alleged a single "strawman" sale, Count 3 alleged improper maintenance of sixteen (16) ATF Forms 4473 (the form that is completed by the purchaser and the licensee when a firearm is sold by a licensee), Count 4 alleged inadequately documented sales to legal aliens, and Count 5 alleged improper maintenance of disposition records.

the Government withdrew its motion for summary judgment to the extent it was based on Count 2 (the alleged "strawman" sale); it did not dispute that its motion referred to only twelve (12) ATF Forms 4473. In response to the district court's inquiry whether the DIO would have revoked Gun World's license based only on the alleged omissions in the Forms 4473, the Government filed an affidavit of the DIO stating that he would have revoked the license based only upon those alleged omissions. Thus, the only issue before the district court was whether the alleged errors in the twelve (12) ATF Forms 4473 were a sufficient basis upon which to have revoked Gun World's license.

By Memorandum Opinion And Order of March 25, 2005, the district court granted the Government's motion for summary judgment; judgment was entered in favor of the Government on the same date. On or about April 8, 2005, Gun World timely filed a motion to alter or amend the judgment. The district court denied the motion on April 15, 2005 in a Statement. Gun World timely filed a notice of appeal.

In a published opinion, the United States Court of Appeals for the Seventh Circuit, on March 20, 2006, affirmed the district court's judgment, with one judge dissenting. App. 1a. A timely filed petition for rehearing *en banc* was denied on May 16, 2006. App. 16a.

Statement of Facts

The twelve (12) Forms 4473 were alleged to have violated 27 C.F.R. § 478.124(c) for the following reasons.

Sale to Thomas Leischner (1/4/99): Gun World "failed

to provide the response initially provided by NICS [the national instant background check system] or the appropriate agency as required by Item 12c of Form 4473." Notice of Revocation of License at ¶ 1. The information that was provided on the Form 4473 by Gun World indicates that the NICS check resulted in an immediate approval because the number in block 12b starts with an "A" for approval, which is the same as a "proceed." Affidavit of Elizabeth Rodgers at ¶ 2. If the NICS check had been denied, the number would start with a "D"; if it had been delayed, the number would start with a "T". *Id.*

Sale to Constantine Giovan (1/29/99): Gun World "failed to obtain a response to whether the transferee had ever been adjudicated mentally defective or been committed to a mental institution as required by Item 9f of Form 4473." Notice of Revocation of License at ¶ 2. Mr. Giovan had been a repeat customer of Gun World for years and had never indicated on a Form 4473 that he had been adjudicated mentally defective or been committed to a mental institution. Affidavit of Elizabeth Rodgers at ¶ 3. When it was discovered that he had not answered one question on the Form 4473, he was asked to provide that one answer, which he did. *Id.* In the time that Mr. Giovan has been known to Gun World, no purchase has ever been denied by the state police. *Id.* Additionally, when the NICS check was done (the same day that Mr. Giovan executed the form), the response was "Proceed." *Id.* There was no evidence that Mr. Giovan had, in fact, been adjudicated mentally defective or committed to a mental institution.

Sale on February 3, 1999 to James Finkle: Gun World "failed to obtain a response to whether the transferee had ever been adjudicated mentally defective or been committed to a

mental institution as required by Item 9f of Form 4473." Notice of Revocation of License at ¶ 3. That information was on another Form 4473 for the sale of another firearm also completed on February 3. Affidavit of Elizabeth Rodgers at ¶ 4. Further, on February 3, Gun World received a "Proceed" response when the NICS check was done. *Id.* There was no evidence that Mr. Finkle had, in fact, been adjudicated mentally defective or committed to a mental institution.

Sale on February 7, 1999 to James Finkle: Gun World "failed to provide the type and number of transferee's identification as required by Item 11a of Form 4473."[3] Notice of Revocation of License at ¶ 4. Although the sale occurred on February 7, 1999, the Form 4473 was completed on February 3, 1999. The information that was omitted on the Form 4473 for the sale on February 7, 1999 (type and number of identification) was on the other Form 4473 completed at the time (for the sale of the firearm on February 3). Affidavit of Elizabeth Rodgers at ¶ 4.

Sale to Edward Thomas (2/26/99): Gun World "failed to provide the transferor's signature, transferor's title and transaction date as required by Items 22, 23 and 24 of Form 4473."[4] Notice of Revocation of License at ¶ 6. The name of the transferor and the date of the transaction were stated on the

---

[3] 27 C.F.R. § 478.124(c)(3)(i) requires only the "type of identification used"; there is no requirement to include the "number" of the identification document.

[4] 27 C.F.R. § 478.124(c)(5) requires only that the licensee "sign and date the form"; there is no requirement that the licensee provide a "title."

sales receipt so that the transferor could easily be determined. Affidavit of Elizabeth Rodgers at ¶ 5. The transaction date was placed on the Form 4473 by the transferee. *Id.*

Sale to Robert Kline (3/1/99): Gun World "failed to provide the transferor's signature, transferor's title and transaction date as required by Items 22, 23 and 24 of Form 4473."[5] Notice of Revocation of License at ¶ 7. The name of the transferor and the date of the transaction were stated on the sales receipt so that the transferor could easily be determined. Affidavit of Elizabeth Rodgers at ¶ 6. The transaction date was placed on the Form 4473 by the transferee. *Id.*

Sale to Rene Roman (4/30/99)(App. at 28-29): Gun World "failed to provide the name of the manufacturer and/or importer of the firearm as required by Item 15 of Form 4473." Notice of Revocation of License at ¶ 10. The model, serial number, type, and caliber were provided; the manufacturer of the firearm could only be Glock, based upon the serial number ("CTG191US"). Affidavit of Elizabeth Rodgers at ¶ 7.

Sale to Douglas Larson (5/28/99): Gun World "failed to provide the type and number of transferee's identification as required by Item 11a of Form 4473."[6] Notice of Revocation of License at ¶ 11. The consignment agreement contains both his

---

[5] 27 C.F.R. § 478.124(c)(5) requires only that the licensee "sign and date the form"; there is no requirement that the licensee provide a "title."

[6] 27 C.F.R. § 478.124(c)(3)(i) requires only the "type of identification used"; there is no requirement to include the "number" of the identification document.

Illinois [Firearms Owner Identification] F.O.I.D. card number and his Illinois driver's license number. Affidavit of Elizabeth Rodgers at ¶ 8.

Sale to Steven Winsor (1/4/00): Gun World "failed to provide the type and number of transferee's identification as required by Item 11a of Form 4473."[7] Notice of Revocation of License at ¶ 13. The sales receipt indicates the type and kind of identification that Mr. Winsor used in that it has both his Illinois F.O.I.D. card number (with expiration date) and his Illinois driver's license number. Affidavit of Elizabeth Rodgers at ¶ 9.

Sale to Conrad Norwood (2/27/00): Gun World "failed to provide the type of transferee's identification as required by Item 11a of Form 4473." Notice of Revocation of License at ¶ 14. The Form 4473 contains Mr. Norwood's Illinois F.O.I.D. card number (top number) and his Illinois state ID card number (lower number). Affidavit of Elizabeth Rodgers at ¶ 10. Gun World knows from the composition and format of the numbers that the top number is an Illinois F.O.I.D. card number and that the lower number is an Illinois state ID card number. *Id.*

Sale to Dennis Haiman (2/12/00): Gun World "failed to provide the type of transferee's identification as required by Item 11a of Form 4473." Notice of Revocation of License at ¶ 15. The Form 4473 contains Mr. Haiman's Illinois F.O.I.D. card number (top number) and his Illinois driver's license number (lower number). Affidavit of Elizabeth Rodgers at ¶ 11.

---

[7] 27 C.F.R. § 478.124(c)(3)(i) requires only the "type of identification used"; there is no requirement to include the "number" of the identification document.

Gun World knows from the composition of the numbers that the top number is an Illinois F.O.I.D. card number and that the lower number is an Illinois driver's license number. *Id.*

Sale to Mark Smith (2/12/00): Gun World "failed to provide the type of transferee's identification as required by Item 11a of Form 4473." Notice of Revocation of License at ¶ 16. The Form 4473 contains Mr. Smith's Illinois F.O.I.D. card number (top number) and his Illinois driver's license number (lower number). Affidavit of Elizabeth Rodgers at ¶ 12. Gun World knows from the composition of the numbers that the top number is an Illinois F.O.I.D. card number and that the lower number is an Illinois driver's license number. *Id.*

The above 12 sales occurred during the period from January, 1999 through February, 2000. During that period, Gun World prepared approximately 880 Forms 4473. Affidavit of Elizabeth Rodgers at ¶ 13. Thus, there were omissions on 1.4% of Gun World's Forms 4473. *Id.* at ¶ 15. In that same period, the Form 4473 contained 39 blocks for recording 58 items of information (for legal alien purchasers, there are an additional 4 items of information). *Id.* at ¶ 16. Thus, for approximately 880 Forms 4473, there were approximately 34,320 blocks to be completed or approximately 51,240 items of information to be provided. *Id.* at ¶ 17. On the 12 Forms 4473 on which ATF found omissions, Gun World failed to complete, or to ensure that the purchaser completed, 16 blocks, *i.e.*, to provide 19 items of information. *Id.* at ¶ 18. Accordingly, there were omissions on a miniscule .05% (5/100%) of the blocks or .04% (4/100%) of the items of information on Gun World's Forms 4473. *Id.* at ¶ 19. Those omissions were "inadvertent" and were not done "with the bad

purpose to disobey or to disregard the law." Affidavit of Barry Soskin at ¶ 8.

ARGUMENT

I.

THE MEANING OF THE TERM "WILLFULLY" IN 18 U.S.C. § 924(a)(1), AS DETERMINED BY THIS COURT IN *BRYAN v. UNITED STATES*, 524 U.S. 184 (1998), APPLIES TO § 923(e)

1. The court of appeals concluded that:

> ATF is not required to show that a gun vendor acted with a "bad purpose or evil motive before a license may be revoked or a renewal application denied." *Stein's, Inc. v. Blumenthal*, 649 F.2d 463, 467 (7th Cir.1980). Instead, ATF must "prove that the petitioner knew of his legal obligation and purposefully disregarded or was plainly indifferent to the recordkeeping requirements." *Id.* (internal citation omitted).

App. 11a-12a.

Further, the court of appeals rejected Gun World's argument that Congress, when it amended 18 U.S.C. § 923(e) in 1986 to add the word "willfully," adopted a different standard for willfulness than established in *Stein's*, *supra*, and that the interpretation of "willfully" in 18 U.S.C. § 924(a)(1) (to which Congress had also added "willfully" in the same act as it added "willfully" in § 923(e)) announced in *Bryan v. United States*, 524 U.S. 184 (1998) should be applied to 18 U.S.C. § 923(e):

> According to Gun World, the Supreme Court implicitly overruled *Stein's* in *Bryan v. United States*, 524 U.S. 184 (1998). Gun World argues that *Bryan* eliminated the "plain indifference standard" and held that willfulness requires a "bad purpose to disobey or to disregard the law." Gun World is incorrect.

App. 12a.[8]

2. Six years after *Stein's* was decided, Congress enacted the Firearms Owners Protection Act of 1986 ("FOPA"), Pub.L. 99-308, 100 Stat. 449 (1986) which, *inter alia*, added the term "willfully" to 18 U.S.C. § 923(e) (Section 103(5) of the FOPA, 100 Stat. at 453) so that it now provides in pertinent part:

---

[8] Prior to 1986, the Eighth and Ninth Circuits adopted the same standard as *Stein's*. See *Lewin* v. *Blumenthal*, 590 F.2d 268 (8th Cir. 1979)("the Bureau must prove that the petitioner knew of his legal obligation and purposefully disregarded or was plainly indifferent to the recordkeeping requirements.") and *Perri* v. *Department of Treasury; Bureau of Alcohol, Tobacco and Firearms*, 637 F.2d 1332, 1336 (9th Cir. 1981)(a willful violation "is established when a dealer understands the requirements of the law, but knowingly fails to follow them or was indifferent to them."

The Fourth Circuit adopted a different standard:

> "'[W]illful' means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, 'regardless of venal motive.'"

Prino v. *Simon*, 606 F.2d 449, 451 (4th Cir. 1979).

> The Secretary may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has willfully violated any provision of this chapter or any rule or regulation prescribed by the Secretary under this chapter . . . .

The identical word was also added by Section 104(a)(1) of FOPA to 18 U.S.C. § 924(a)(1). FOPA amended § 924(a):

> to add a scienter requirement as a condition to the imposition of penalties for most of the unlawful acts defined in § 922. For three categories of offenses the intent required is that the defendant acted "knowingly"; for the fourth category, which includes "any other provision of this chapter," the required intent is that the defendant acted "willfully."

Bryan, *supra*, 524 U.S. at 188.

In view of the distinction between "knowing" and "willful" violations, *Bryan*, *supra*, approved a jury instruction which defined "willfully" in 18 U.S.C. § 924(a)(1) as follows:

> "A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids."

524 U.S. at 190.

The *Bryan* definition of "willfully" is equally applicable in both criminal and civil proceedings. *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U.S. 152 (1993) held that it "is a 'normal rule of statutory construction' (citation omitted) that 'identical words used in different parts of the same act are intended to have the same meaning' (citation omitted)." 508 U.S. at 159. See also *Brown v. Gardner*, 513 U.S. 115, 118 (1994)("there is a presumption that a given term is used to mean the same thing throughout a statute").

Under the Gun Control Act of 1968 ("GCA")(Chapter 44 of Title 18, § 921 *et seq.*), the single meaning rule applies with even greater force because the "willfully" requirement was established in both the criminal penalties provision of the GCA (§ 924(a)(1)) and the license revocation provision of the GCA (§ 923(e)) by the same act of Congress, the FOPA. See FOPA Sections 103(5) and 104(a)(1).

3. Although *Bryan* mentioned *Stein's*, noting that, in *Stein's*, "the licensee had knowledge of the law" and that the case "support[s] the notion that disregard of a known legal obligation is sufficient to establish a willful violation," 524 U.S. at 198, that reference was not an approval of the full holding in *Stein's*. Rather, a careful reading of *Bryan* reveals that this Court did not adopt the holding of *Stein's* to the extent *Stein's* approved a "plain indifference" standard.

The context in which this Court discussed *Stein's* was the petitioner's argument that the Government had to prove not merely "knowledge that the conduct is unlawful" (524 U.S. at

196), but that he had knowledge of the specific statute he was charged with violating (the "federal licensing requirement," 524 U.S. at 190).[9] The petitioner argued that a "a more particularized showing is required" (524 U.S. at 192), *i.e.*, not merely that the conduct was unlawful, but that it violated a specific statute. To support his argument, the petitioner contended that:

> at the time FOPA was passed, the "willfulness" requirements in other subsections of the statute — §§ 923(d)(1)(C)-(D) — had uniformly been interpreted by lower courts to require knowledge of the law . . . .

524 U.S. at 196.

In rejecting the argument that the Government had to prove that the petitioner had knowledge of the specific statute he was charged with violating, this Court first noted that "the lower courts had come to no such agreement" and that "some courts had stated that willfulness in § 923(d)(1) is satisfied by a disregard of a known legal obligation, [footnote] . . . ." *Id.* at 196-97. The footnote stated: "See, *e.g.*, *Perri v. Department of the Treasury*, 637 F.2d 1332, 1336 (CA9 1981); *Stein's Inc. v. Blumenthal*, 649 F.2d 463, 467-468 (CA7 1980)." Further,

---

[9] In the criminal context:

> to establish a "willful" violation of a statute, "the Government must prove that the defendant acted with knowledge that his conduct was unlawful." (citation omitted).

524 U.S. at 191-192.

this Court observed that, in these cases, "the licensee had knowledge of the law . . . " *Id.* This Court concluded that, "while these cases support the proposition that disregard of a known legal duty is sufficient to establish a willful violation, they in no way stand for the proposition that it is required." (emphasis added).

The "it" to which this Court was referring was knowledge of a specific legal obligation, *i.e.*, knowledge of a specific statute (or regulation). Thus, the point this Court was making was only that, to prove a willful violation in the criminal context, the Government did not have to prove knowledge of a specific statute. This Court did not suggest that, in the administrative context, ATF did not have to prove that a licensee acted "intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law."

The only lesson that can properly be drawn from *Bryan* is that ATF does not have to prove that a licensee had knowledge of the specific statute it is alleged was violated; "willfully" nonetheless requires proof that a licensee acted "intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law."

Notably absent from *Bryan* is even a passing reference to the "plain indifference" standard mentioned in *Stein's*. Indeed, in view of *Bryan*'s approval of a jury instruction defining "willfully" as requiring an intentional and purposeful act, with the intent to do something the law forbids, mere indifference would certainly not have been adequate. Thus,

Bryan approved *Stein's* only to the extent *Stein's* required proof that the licensee knew of its legal obligation and purposefully disregarded that obligation; to the extent that *Stein's* held that the Government may prove that a licensee knew of its legal obligation and was "plainly indifferent to" its legal obligation, *Bryan* rejected such an interpretation of willfulness in § 923(d)(1).

4. Congress' intent that "willfully" be interpreted in the license revocation provision of the GCA in the same fashion as in the criminal penalties provision of the GCA is emphasized by the enactment in Section 103(6)(B) of the FOPA of § 923(f)(4), which links a license revocation proceeding to a criminal proceeding:

> If criminal proceedings are instituted against a licensee alleging any violation of this chapter or of rules or regulations prescribed under this chapter, and the licensee is acquitted of such charges, or such proceedings are terminated, other than upon motion of the Government before trial upon such charges, the Attorney General shall be absolutely barred from denying or revoking any license granted under this chapter where such denial or revocation is based in whole or in part on the facts which form the basis of such criminal charges.

5. The legislative history of the FOPA also confirms the single meaning of "willfully" and "leaves no room for doubt about Congress' intent." *J. W. Bateson Co. v. Board of*

Trustees, 434 U.S. 586, 591 (1978).[10]

In Section 104(a)(1) of the FOPA, Congress added the willfulness element to the criminal penalties provision of the GCA (§ 924(a)(1), the provision interpreted in *Bryan, supra*). S.Rep. No. 98-583, 98th Cong., 2d Sess. (1984)[11] stated:

> The purpose of that change was to avoid prosecutions in cases where, for instance, a licensee carelessly committed a technical record-keeping violation or other minor, inadvertent infraction.

S.Rep. No. 98-583 at 94.

---

[10] Analysis of the "purpose and legislative history" of a statute are among the "traditional tools of statutory construction" to which this Court looks "for clues of congressional intent." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 300 (1988).

[11] In *National Rifle Ass'n v. Brady*, 914 F.2d 475, 485 (4th Cir. 1990), the Fourth Circuit observed that S.Rep. No. 98-583 was the applicable report for FOPA:

> There was no Senate Report on Pub.L. No. 99-308. S.Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub.L. No. 99-308.

914 F.2d at 485.

S.Rep. No. 98-583 should be accorded substantial weight because a "committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen*, 396 U.S. 168, 186 (1969).

S.Rep. No. 98-583 described the purpose for adding "willfully" to § 923(e) in almost identical terms: the "purpose of this change is to ensure that licenses are not revoked for inadvertant errors or technical mistakes." S.Rep. No. 98-583 at 88.

Accordingly, it is evident that Congress intended that "willfully" have the same meaning in § 924(a)(1) and § 923(e), and that, because this Court has definitively interpreted "willfully" as it means "act[ing] intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law" in § 924(a)(1), "willfully" perforce has that meaning in § 923(e).

S.Rep. No. 98-583 also confirms that Congress intended application of the *Bryan* formulation in stating that the addition of "willfully" would:

> codif[y] current case law by requiring "willful" violations of Chapter 44 as a ground for license revocation, just as a "willful" violation of Chapter 44 would preclude mandatory issuance of a license under 18 U.S.C. 923(d)(1)(C) and (D).[fn]

S.Rep. No. 98-583 at 88.

The "current case law" (which had construed § 923 as including a "willfully" element in a license revocation proceeding) is set forth in the footnote of the Senate Report; the primary case cited, and the only case quoted by the Committee Report, is *Rich v. United States*, 383 F.Supp 797 (1974):

> *See, e.g., Rich v. United States*, 383 F. Supp. 797, (S.D. Ohio, 1974) (". . . [R]evocation [for error, inadvertence, or simple ignorance of regulation] then becomes an exercise in futility if thereafter the Secretary by the plain language of Subsection 923(d) must reissue the license absent a showing of willful violation. It cannot be that Congress intended this formalistic paradox."), *Shyla v. Director, BATF*, 448 F. Supp. 409 (M.D. Pa. 1977), *Mayesh v. Schultz*, 58 F.R.D. 537 (S.D. Ill. 1973).

S.Rep. No. 98-583 at 12, n.30.

Rich explained that, if "willfulness" need not be proved by ATF, a license could be revoked for "error, inadvertence, or simple ignorance of regulation" and noted that the "Secretary has urged that 'willful' be deemed to include careless disregard . . . ." 383 F.Supp. at 800. *Rich* rejected that standard because "Congress was concerned with purposeful, intentional conduct to be punished by revocation of licenses rather than mere negligence on the part of the licensee." 383 F.Supp. at 800.

In light of the committee's citation and quotation of *Rich*, it is clear that the committee adopted the reasoning of *Rich*. Because a court's objective "is to ascertain the congressional intent and give effect to the legislative will," *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975), and that intent is expressed by S.Rep. No. 98-583, "willfully" must be interpreted to mean purposeful, intentional conduct.

6. Further supporting the argument that the construction

of "willfully" in § 924(a)(1) is equally applicable to § 923(e) is the fact that "willfully" is a term that has a long usage in the law. Thus, the "established meaning" must be applied. See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms"). *Bryan, supra,* noted that generally "willfully" "differentiates between deliberate and unwitting conduct . . . ." 524 U.S. at 191. Thus, "willfully" must be interpreted to mean deliberate, not unintentional, conduct. Indeed, if mere "knowing" conduct was sufficient to prove a "willful" violation, the distinction between "knowingly" and "willfully" that Congress created in 1986 would be a nullity.[12]

A recent opinion of the United States District Court for the Eastern District of Virginia is instructive in understanding the meaning of "willfully." In *Tysinger Motor Co. v. United States,* --- F.Supp.2d ----, 2006 WL 940320 (E.D.Va. 2006),

---

[12] Even after Congress amended 18 U.S.C. § 923(e) in 1986 to add the word "willfully," the Sixth and Eleventh Circuits, without giving any consideration to the amendment and its legislative history, adhered to the view of the Seventh, Eighth, and Ninth Circuits. See *Appalachian Resources Development Corp.* v. *McCabe*, 387 F.3d 461 (6th Cir. 2004)("where a licensee understands his or her legal obligations under the GCA, yet fails to abide by those obligations, his or her license can be denied or revoked on the basis that the dealer "willfully" violated the GCA.") and *Willingham Sports, Inc.* v. *Bureau of Alcohol*, Tobacco, Firearms and Exposives, 415 F.3d 1274, 1277 (11th Cir. 2005)("a showing of purposeful disregard of or plain indifference to the laws and regulations imposed on firearms dealers shows willfulness for purposes of § 923(d)(1)(c).").

the IRS (of which the ATF was once a part and then a sister agency in the Treasury Department before becoming a part of the Department of Justice) alleged that *Tysinger* failed to file a Form 8300 (reporting the acceptance $10,000 or more in cash in a business transaction) for four of eight reportable transactions. In determining that the violation was not willful, the court first noted that ~~there did not~~ need to be "proof of intent to violate the law," * at 5. The court then observed that there is "no proof that anyone at the company made a conscious decision not to report the transactions; the failures to report were simply mistakes," *id.*, and concluded: "Sloppiness is not the same as willfulness . . . ." At * 6.

II. GUN WORLD DID NOT "WILLFULLY" VIOLATE THE REGULATION

The omissions in the Forms 4473 were inadvertent errors or technical mistakes and were not done with the bad purpose to disobey or to disregard the law. Moreover, at no time was Gun World indifferent to the requirements of the law.

The evidence of Gun World which, for purposes of summary judgment, must "be believed" and from which "all justifiable inferences are to be drawn in [Gun World's] favor," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), was that information was omitted on 12 Forms 4473 from January, 1999 through February, 2000.

On 6 forms, Gun World omitted the type of identification used by the buyer (although the type of identification was known from another document); on 2 forms, Gun World's salesperson omitted his signature and the date of the transfer (although the information was on another

document); on 2 forms the buyer did not state whether he had ever been adjudicated mentally defective or been committed to a mental institution (although in both instances he was not and that was known to Gun World); on 1 form, Gun World omitted the initial NICS response (although the form also indicated an approval number); and on 1 form, the firearm manufacturer was not expressly stated (although it was known by the serial number and model). During that period, Gun World prepared approximately 880 Forms 4473. Affidavit of Elizabeth Rodgers at ¶ 13. Thus, there were omissions on 1.4% of Gun World's Forms 4473. *Id.* at ¶ 15. Looked at even more precisely, in the period from January, 1999 through February, 2000, the Form 4473 contained 39 blocks for recording 58 items of information (for legal alien purchasers, there are an additional 4 items of information). *Id.* at ¶ 16. Thus, for approximately 880 Forms 4473, there were approximately 34,320 blocks to be completed or approximately 51,240 items of information to be provided. *Id.* at ¶ 17. On the 12 Forms 4473 on which ATF found omissions, Gun World failed to complete, or to ensure that the purchaser completed, 16 blocks, *i.e.*, to provide 19 items of information. *Id.* at ¶ 18. Accordingly, there were omissions on a miniscule .05% (5/100%) of the blocks or .04% (4/100%) of the items of information on Gun World's Forms 4473. *Id.* at ¶ 19. Those omissions were "inadvertent" and were not done "with the bad purpose to disobey or to disregard the law." Affidavit of Barry Soskin at ¶ 8.

With the successful completion rate of 99.96%, it is apparent that Gun World was making a sincere effort to comply with the law and did not purposely or intentionally disregard its obligations. Justice Kennedy's observation about lawyers and judges is equally true of small business owners:

> We all tend toward myopia when looking for our own errors. Every lawyer and every judge can recite examples of documents that they wrote, checked, and doublechecked, but that still contained glaring errors.

Groh v. Ramirez, 540 U.S. 551, 568 (2004)(Kennedy, J., dissenting).

The minuscule omission rate reflects that Gun World did not purposely or intentionally disregard its legal obligations. Further, the fact that the correct information was on other non-ATF documents demonstrates that Gun World did not purposely or intentionally disregard its legal obligations in that it obtained the required information and simply did not place it on the Form 4473. Because there is no evidence that Gun World purposely disregarded its legal obligations, application of that standard would have resulted in reversal of the judgment of the district court.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit to determine whether the 1986 amendment to § 923(e) adding the term "willfully" adopted a different standard of willfulness than established in *Stein's*, and thus whether "willfully" must be interpreted to mean purposeful, intentional conduct.

RICHARD E. GARDINER*
Suite 404
10560 Main Street
Fairfax, Virginia 22030
(703) 352-7276

Counsel for Petitioner
*Counsel of Record

August, 2006